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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Appellant*,

v.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Northern District of Illinois.

REPLY BRIEF OF APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appeal from the District Court of the United States for the Northern District of Illinois.

REPLY BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

The appellees' brief shows that the purpose of the Commission and the object of the proceedings instituted by the citation directed to the Chicago District Pipeline Company, is, as alleged in appellant's bill, to treat appellant and Chicago District Pipeline Company as one organization, and to prescribe and regulate rates for the combined services of appellant and the District Company as though those services were performed by a single public utility within the

jurisdiction of the Commission. Appellees expressly rely upon the decisions of this Court, announcing and applying the one organization rule as authority for the citation and order complained of by appellant*, and state

> "As these decisions demonstrate conclusively the public character of appellant's business, whether its rates are subject to direct regulation or not, it would appear that the Commission under the Smith and Western Distributing Company cases would be amply justified in giving consideration to the cost of service principle (*i.e.* fair return upon value or cost of property) in determining the reasonableness of Chicago District's operating expenses". (Appellees' brief p. 47)

Appellees further state that the Commission's citation to the District Company requires the same response as the showing required in the one organization cases and that such response will include an analysis of the information demanded of appellant in the order complained of in this case (Appellees' brief p. 2). In other words, the Commission is demanding that appellant prepare and submit the evidence necessary to establish a rate base for gas sold by appellant to the Chicago District Pipeline Company, and by the latter to the distributing companies.

Statements made by appellees that they are "not concerned with what the appellant may or should receive from the sale of its gas" are meaningless, first, because such statements are inconsistent with the one organization rule which the Commission proposes to apply; and, second, because public utilities in general, and the Chicago District Pipeline Company in particular, can not continue to pay more for supplies than the amount which they are permitted to include in their operating expenses. In refusing to accept the contract price as the fair measure of the cost of gas to the Chicago District Pipeline Company and to allow that amount as an element in its operating expense,

*Appellees' brief, pages 2, 34, 46, 50.

and in substituting for that contract price *"a fair return upon value or cost of property"* of Natural Gas Pipeline Company of America, the Commission is *primarily* "concerned with what appellant may and should receive from the sale of its gas".

The Commission is not interested in determining whether the contract between appellant and the Chicago District Pipeline Company is a provident contract. The Commission is not concerned with the circumstances surrounding the negotiation and execution of that contract. The Commission denies the right of appellant to produce evidence on the question of whether or not that contract was a result of arm's length bargaining in the general and open market subject to the usual safeguards of bargaining and competition. The Commission will not permit appellant to prove that the relationship between it and the Chicago District Pipeline Company does not result in common control of the two companies, and did not in any degree or manner influence the actions or policies of either party to the contract, nor any of the terms or provisions thereof. The Commission does not consider as material the fact that the execution of that contract has resulted in great savings to the consumers of gas in the State of Illinois. The Commission does not attach any significance to the fact that the Chicago District Pipeline Company cannot and could not have obtained gas from any other source at rates as low as those stipulated in the supply contract with appellant. The Commission is interested only in fixing a charge for the gas purchased by the Chicago District Pipeline Company which will not allow appellant more than it deems to be a *"fair return upon value or cost of property"* of appellant.

Commission's Order Not Based Upon Common Control.

The only theory under the decisions of this Court, or any other court, upon which the Illinois Commerce Commission would be justified in taking the position it now asserts is the one suggested by the *one organization*

cases*, predicated upon the absence of arm's length bargaining. But neither the order of the Commission nor the citation to the Chicago District Pipeline Company recites the absence of arm's length bargaining. The Commission has never found absence of arm's length bargaining. The Commission has never inquired into that subject. The order of the Commission complained of by appellant is in terms bottomed upon Section 8a of the Illinois Public Utilities Act and was sustained by the court below on that basis. The court below did not find an absence of arm's length bargaining nor any of the facts which this Court has made the basis of the one organization rule, but held Section 8a to authorize the order of the Commission—and such has been the position of the appellees throughout this litigation until they filed their brief with this Court. Now appellees apparently see difficulty in sustaining the validity of Section 8a as they interpret that section and contend "that a common interest existed between the companies"; that the companies "were entered in a common enterprise", and that plaintiff has no competition from wholesalers of natural gas in the Chicago area.** If these supposed facts are necessary to sustain the

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*Smith v. *Illinois Bell Telephone Company*, 282 U. S. 133, 152; *Western Distributing Co.* v. *Public Service Comm'n. of Kansas*, 285 U. S. 119, 124, 126; *Dayton Power & Light Co.* v. *Public Utilities Comm'n.*, 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n. of Ohio*, 292 U. S. 398, 414.

**Reference is made (Appellees' brief, p. 38) to the finding of the three judge court "that plaintiff has no competition from wholesalers of natural gas in the Chicago area". That finding of fact was taken from the Commission's answer filed on the day that the motion for the interlocutory injunction was submitted. Under Equity Rule 31 that statement must be deemed to have been denied; nevertheless the three judge court included it in the finding of facts over objection (R. 102), and this illustrates, we think, one of the vices of the effort of the three judge court to determine this case on the merits without a trial. So far as the matter of competition affected this contract it was the existence or non-existence of competition at the time the contract was negotiated. At that time the appellant had not yet brought gas into Illinois, but it and two other wholly independent pipeline companies were building their pipelines north from the Texas field and were at that juncture as competitive with respect to who should obtain the Illinois business as if they had all been present in Illinois at that time.

Commission's order, or material to any issue before the Court, appellant should be given an opportunity to controvert them by evidence.

Appellant's Offer to Prove Arm's Length Bargaining Bona Fide.

Appellees assert that appellant's offer to prove that there is no common control of appellant and Chicago District Pipeline Company, that the relationship between the two companies did not in any degree or in any manner influence the actions or policies of either party to the contract, or any of the terms and provisions thereof, and that the contract was executed after the most rigid arm's length bargaining in an open and competitive market, is not made in good faith and is ridiculous in view of the fact that this suit has been pending since March 11, 1937. When the application for an interlocutory injunction was argued before the three judge court, appellant pointed to the issues of fact and asked the court to refer the case to a Master to hear the evidence. Counsel for the appellees vigorously resisted this request, contending there, as they do in their brief here,* that there is no question of fact in the case, that the case involves only questions of law, namely, whether Section 8a authorizes the order in question. The court below adopted this view and sustained the order of the Commission as a matter of law without hearing any evidence and without permitting appellant to show the facts.**

In the court below the appellees based their entire case upon their theory of the construction and constitutionality

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*On page 69 of appellees' brief appears the following:

> "We submit that this application of appellant for an injunction can be decided on the legal issues alone and that the District Court properly found for the appellees on those issues".

And on page 80:

> "Since the questions involved in this case are entirely questions of law as we have pointed out, since no useful purpose would be served by a hearing of evidence in this cause * * *".

**See Findings of Fact and Conclusions of Law, R. 90 to 97.

of Section 8a of the Public Utilities Act, but now appellees ask this Court to accept as fact the allegations of their answer, and imply that those allegations have been admitted by the appellant, although the answer was filed on the day the case was argued in the District Court, and Rule 31 for the Courts of Equity of the United States specifically provides that any new or affirmative matter contained in the defendants' answer "shall be deemed to be denied by the plaintiff."

Former Testimony of Appellant's Officers.

Throughout appellees' brief will be found numerous statements that appellant "freely and willingly permitted its officers to testify as to estimates" of appellant's earnings in 1932 when Chicago District Pipeline Company filed its initial rate schedules with the Commission. There is no basis in the record for these statements and their purpose is not clear. Appellant was not a party to those proceedings and, so far as appellant knows, none of its officers testified in the case. The attorney for the Chicago District Pipeline Company appears to have made an independent arrangement with one of the appellant's directors who had represented appellant in negotiations with the Chicago District Pipeline Company, resulting in the execution of the supply contract, to present to the Commission some of the estimates that had been prepared by him in connection with such negotiations. It also appears that the same attorney made an independent arrangement with one of appellant's engineers to give some testimony as to oil leases held by an affiliate of appellant; but these arrangements were not made with the appellant company and neither of these witnesses in any sense represented appellant, and appellant assumed no responsibility for their testimony. If any of the officers of appellant testified in these or any other proceedings before the Commission appellant has no knowledge of that fact.

Compliance With Order Not Necessary to Control of Intrastate Rates.

Appellees' contention that the position taken by appellant, if sustained, would prevent the Commission from regulating the cost of gas to consumers in the State of Illinois, is merely an assertion that appellant's position, if sustained, would prevent the Commission from regulating a sale in interstate commerce made in good faith, at arm's length, and in an open competitive market. The gas actually delivered by the distributing companies to the consumers in the Chicago metropolitan area is a mixture of about 50 per cent artificial gas and 50 per cent natural gas purchased from appellant. The Commission granted the Chicago District Pipeline Company a certificate of public convenience and necessity which enabled it to supply the distributing companies with gas purchased under its fifteen-year contract with appellant. That contract has resulted in great savings to consumers in Illinois (R. 72) and the Commission would have been guilty of a gross breach of its duty to the public if it had refused to permit the arrangement which has produced that great saving. Having found that that contract was provident, and having permitted and authorized the District Company to become a party thereto, unless and until it is established that the facts of the case warrant the application of the one organization rule the Commission has no right to review, regulate or pass judgment upon the reasonableness of the profits of the appellant under that contract. This Court has held that that function is one reserved to the Congress of the United States.*

Appellant's Damage.

Appellees' assertions that the damage which would result to appellant from enforcement of the order of the Commission is nominal, is false and unsupported by the record.

**Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308. See also appellant's brief, pages 38 and 39.

The Commission proposes to require appellant to establish a rate base from which to compute a "fair return upon value or cost of property" for appellant's services. This Court knows what great expense is involved in the establishment of a rate base, particularly of an industry such as appellant's.* The court below found that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000 and the appellees took no exception to that finding. Appellant alleges in its complaint (R. 8), supports that allegation by affidavit (R. 76), and is prepared to prove beyond question or doubt, that the actual cost of compliance with the requirements of the Commission will be many times $3,000; that compliance with the order will result in the disclosure of appellant's business affairs and trade secrets, to its irreparable harm and injury, and that appellant's credit will be impaired, to its great and irreparable loss.

THE ORDER OF THE ILLINOIS COMMERCE COMMISSION IS NOT AUTHORIZED BY SECTION 8a OF THE ILLINOIS PUBLIC UTILITIES ACT.

The Commission has cited no case supporting its construction of Section 8a, and has wholly failed to distinguish *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, which involved almost the exact problem of construction involved in the present case.

The appellees' discussion of this point suggests reasons, other than those discussed in appellant's brief, why the powers of inquiry and investigation granted by paragraph 2 of Section 8a are to be exercised only in aid of the performance of the duty provided in paragraph 3, namely, to approve and disapprove contracts with affiliates, hereafter made.

**Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133; *Western Distributing Co.* v. *Public Service Comm'n. of Kansas,* 285 U. S. 119; *Dayton Power & Light Co.* v. *Public Utilities Comm'n.,* 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n. of Ohio,* 292 U. S. 398.

House Bill No. 485.

Section 8a was added to the Illinois Public Utilities Act by House Bill 485, approved July 8, 1933. This Act is entitled "An Act to Amend Section 8 of Article I; Sections 27 and 30 of Article III; Sections 32, 36, 38 and 39 of Article IV; and to add Section 8a to Article I; Section 27a to Article III; Section 41a to Article IV; and Section 68a to Article V of 'An Act Concerning Public Utilities' approved June 29, 1931, as amended".* In making these extensive changes in the many provisions of the Illinois Public Utility Act the power to obtain facts from "affiliated interests" and the duty to pass upon contracts with such interests were embraced in a single section. The fair construction of this, we believe, is that the legislature granted the power stated in paragraph 2 as an aid to the discharge of the duty imposed by paragraph 3, and did not, as the Commission contends, mean that the two were to be wholly unrelated. If the grant of power in paragraph 2 was intended to be used by the Commission in connection with its rate-making duties as the Commission argues, it would have been placed in Article V entitled "Proceedings Before the Commission and in the Courts" which provides for investigation and hearings and the issuance of subpoenas by the Commission, and grants the Commission power to inspect the records, books and accounts, and examine the agents, officers and employees of utilities.**

Section 9 of the Public Utilities Act*** requires public utilities to furnish the Commission with all information *"required by it to carry into effect the provisions of this Act"*. Section 60**** authorizes the Commission to hold hearings and issue subpoenas *"concerning any matter covered by the provisions of this Act."* Section 63***** gives

*Session Laws of Illinois, 1933, page 841.
**See Appendix B, appellant's brief, pages 70 to 74.
***Chap. 111-2/3 Ill. Rev. Stat. 1937, Sec. 9.
****Appendix B, appellant's brief, page 70.
*****Appendix B, appellant's brief, page 73.

the Commission power to inspect the books and examine the officers and employees of public utilities *"in relation to any matter within the jurisdiction of the Commission"*. By these sections the Commission is vested with general powers of inquiry and investigation to enable it to perform the duties imposed upon it by other sections of the Act. If it had been the intention of the Illinois legislature to enlarge these general powers of inquiry and investigation by the provisions of paragraph 2 of Section 8a, it seems probable that paragraph 2 would have been made a separate section of the Act like the sections mentioned above, and would have contained some such language as that quoted from those sections, indicating that intention. Paragraph 2 of Section 8a contains no such language, and, in the words of this court found in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 420, the grant of power in paragraph 2 followed by the imposition of a duty *"in the section (paragraph) next following, with hardly a word between, hang together and show the purposes for which it was intended that"* the power should be exercised.

Statutes of Other States.

Appellees name some sixteen States that have enacted laws similar in some respect to Section 8a of the Illinois Public Utilities Act (Appellees' Brief p. 31). The statutes of eight of these States purport to empower the State Commission involved to investigate accounts and records of transactions wth affiliates.* Four of these eight statutes make this grant of power general in terms. In each of these statutes the grant is made in a section involving the imposition of no new duty upon the Commission, and three of the four statutes expressly state that the power may be exercised in the performance of all the duties of the Com-

*See Note 4, page 32, appellees' brief.

mission.* Two such statutes had been approved when Section 8a was added to the Illinois Public Utilities Act.** However, instead of following the form and terms of these Acts, the Illinois legislature adopted almost verbatim the New York statute which was then the only act of its kind on the State statute books, and which linked the power of investigation and inquiry with the imposition of a new duty, and eliminated the provision that such power might be exercised in the *general performance* of the duties of the Commission.

If the Illinois Legislature had intended to grant to the Commission general powers of investigation and inquiry, it is reasonable to suppose that it would have followed the broader form of statute which had been adopted by the States of Alabama and Massachusetts. Those statutes were similar in form and content to the general grants of power of investigation and inquiry contained in Sections 9, 60 and 63 of the Illinois Public Utilities Act referred to above. The action of the legislature is indicative of an intention to limit the scope of the power granted.

Purpose of Section 8a.

Prior to the enactment of Section 8a this court had held that the Illinois Commerce Commission had inherent power to require a local utility to establish the reasonableness of any amount paid for supplies if the buyer and seller company were subject to common control.*** But this power was not available to the State to control such transactions *ab initio*. It is for this reason no doubt that Section 8a was limited in its application to contracts thereafter made, and provides that such contracts are void unless approved. The constitutionality of Section 8a so construed is not here involved.

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*Alabama Laws, 1932, No. 232, Sec. 10; Arkansas Acts, 1935, No. 324, Sec. 28; Massachusetts General Laws, 1932, Vol. 2, Ch. 164, Sec. 85; and New Jersey Public Laws, 1935, Ch. 53, Secs. 1 and 3.

**See Alabama and Massachussets statutes referred to above.

***Smith v. *Illinois Bell Telephone Company*, 282 U. S. 133, 152.

THE PROVISIONS OF SECTION 8a OF THE ILLINOIS PUBLIC UTILITIES ACT, AS CONSTRUED AND RELIED UPON BY THE COMMISSION TO SUSTAIN ITS ORDER, ARE IN CONFLICT WITH THE FOURTEENTH AMENDMENT.

Similar Statutes in Other States.

It is apparently appellees' position that the fact that sixteen states, besides Illinois, have adopted statutes containing some of the features of Section 8a of the Illinois Public Utilities Act, is persuasive of its reasonableness. It is significant, however, that only nine states have empowered their respective commissions to investigate accounts and records of transactions with affiliates.* One of these nine states has permitted such investigation only when the Commission finds as a matter of fact that there is "substantial" common control or the "absence of equal bargaining power";** and one of the remaining eight states will permit such investigation only when a contract is submitted to the Commission for its approval.***

Appellees' argument then comes to this,—that only seven of the forty-eight states have deemed it proper to authorize their rate regulatory bodies to investigate accounts and records of transactions with affiliates related by common directors or some degree of common stock ownership. Three of these states, including Illinois, have merely adopted the New York statute; and the fact that there was no independent thought or research devoted to the subject by the legislatures of at least some of these states is indicated by the record in Illinois. Neither the Committee of the Illinois Senate nor of the House of Representatives to which Section 8a was referred for consideration made any report on the statute, and virtually no evidence was heard

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*See note 4, page 32, Appellees' brief.

**Massachusetts General Laws 1932, Vol. 2, C. 164, Sec. 85.

***Oregon Code Ann. Supp. 1935, Sec. 61-272.

by either of these Committees with respect to its meaning, purpose or effect.

Section 8a and the Detection of "Unfair Advantage."

Appellees' second argument in support of the statute seems to be that it is reasonable that the Commission should be permitted to investigate contracts between public utilities and affiliates, as that term is defined in the statute, to determine whether "an unfair advantage has been taken of the local utility". Appellees state "that Section 8a of the Public Utilities Act is properly construed as delegating to the Commission the duty of determining whether or not an affiliate, as that term is defined in the statute, has taken an unfair advantage of its related local public utility company". (Appellees' brief p. 40.) *The Commission is not, in fact, so construing Section 8a.* The Commission is not attempting to determine whether an unfair advantage has been taken of the Chicago District Pipeline Company, but is attempting to establish a rate base upon which to predicate rates for the appellant's service.

Contracts Between Corporations With Interlocking Directorates.

Appellees suggest that those cases, holding that contracts between corporations having interlocking directorates will be closely scrutinized, demonstrate the reasonableness of Section 8a; but neither this Court nor any other court, as far as we have been able to ascertain, has ever held that a contract, which is fairly and honestly made after arm's length bargaining and without fraud and collusion, may be avoided and disregarded merely because the two corporations involved had one director in common, or because ten per cent of the stock of the two corporations was held by the same person or persons. The most that the cases hold is that contracts between corporations with interlocking directorates will be closely scrutinized for evi-

dences of fraud and collusion. In the instant case appellant has offered to prove that the supply contract in question was executed without fraud and collusion and in the open market subject to the usual safeguards of bargaining and competition, but the Commission and the court below refused to hear such evidence, holding that as a matter of law Section 8a authorizes the Commission entirely to disregard appellant's contract with Chicago District Pipeline Company in fixing the rates for natural gas to the distributing companies.

The One Organization Cases.

The cases applying the one organization rule are in no sense authority for the reasonableness of Section 8a as interpreted by the Commission, for in all such cases this Court has found as a matter of fact, after investigation and hearing, (which has thus far been denied in this case) that the utility and the affiliated corporation were controlled by the same interest and that there was an absence of arm's length bargaining and all the elements which go to make market value in the negotiation and execution of the supply contract involved.

The decisions of this Court involving the rates of interstate pipeline companies may be divided into two categories —(1) those in which the interstate company and the local distributor were controlled by a single interest, and where the supply contract was not the result of arm's length bargaining in the open market, but was arbitrarily imposed upon the distributor by those in control of the two corporations;* and (2) those in which the interstate supply company and the local distributor were controlled by independent interests and the supply contract was the result of

Western Distributing Co. v. *Public Service Comm'n of Kansas,* 285 U. S. 119, 124, 126; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n of Ohio,* 292 U. S. 398, 414. (See also, *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 152, which is one of the so-called "One organization cases").

arm's length bargaining.* In cases falling into the first category, the local commission has been permitted to treat the two corporate entities as one organization and to establish a rate base and prescribe rates for the entire enterprise. In cases falling into the second category, this Court has uniformly held that the State Commission has no jurisdiction over the rates of the interstate company and that the price provided by the supply contract is a proper measure of operating expense for the local distributor. Section 8a, as construed by the Commission in its order here complained of, would arbitrarily reclassify the cases on the basis of ten per cent stock ownership or one or more directors in common. The appellees have nowhere in their brief suggested any justification for, or cited any case in support of, this arbitrary classification.

The Wichita Gas Company Case.

While the opinion of this Court in *State Corporation Commission of Kansas* v. *Wichita Gas Company,* 290 U. S. 561, in no sense supports the constitutionality of Section 8a of the Public Utilities Act, the appellees place so much reliance upon the decision that it seems advisable to call the Court's attention to the following features of that case which distinguish it from the one at bar:

1. In the *Wichita Gas Company case* this Court found as a matter of fact that the distributing companies were controlled by Henry L. Dougherty, who also controlled the supply company and Henry L. Dougherty & Company (p. 563). There has been no finding of common control of appellant and the Chicago District Pipeline Company and none in fact exists.

2. This Court did not find it necessary to pass upon the question of whether the single enterprise rule was applicable to the facts involved in the *Wichita Gas Company case,* but decided the case on other grounds (p. 568).

*See the cases cited on page 38 of Appellant's brief.

3. The order complained of in the *Wichita Gas Company case was directed to the local distributors within the jurisdiction of the Commission* (p. 566); the interstate supply company was not a party to the proceedings before the Commission and no order of any character was directed against it.

4. The order involved in that case imposed no burden either upon the local utilities or upon the interstate supply company and was nothing more than a finding of fact that certain payments should not be set up as expense items by the local distributing companies (p. 566). The order in the present case is more than a finding of fact—it is an exercise of jurisdiction. It directs the appellant immediately to produce the evidence necessary to establish a rate base, to its irreparable injury and damage.

Cases Cited by Appellant.

The appellees have been unsuccessful in their attempt to distinguish the cases cited by appellant (p. 39 of appellees' brief). The Commission contends that in the cases cited the damage followed immediately upon the determination of the fact made the basis of the presumption, but that in this case the damage only can follow further hearing and determination of other facts by the Commission. But the damage follows immediately here too if the statute authorizes the Commission's order on appellant to produce the evidence necessary to determine a rate base.

The presumption of common control raised by Section 8a is no less immediate and vicious than the presumptions held invalid in *Schlesinger* v. *Wisconsin,* 270 U. S. 230 and the other cases cited on pages 33 to 36, inclusive, of appellant's brief. Section 8a, as interpreted by the Commission conclusively presumes absence of arm's length bargaining and common control, if there is ten per cent common stock ownership or a common director. Acting on this interpretation, the Commission applies the statute to appellant by an

order which would require it immediately to make the showing necessary to establish a rate base for the commodity sold in interstate commerce. The making of such a showing entails immediate and irreparable damage to appellant.

On the issue as to whether this statute is arbitrary, we respectfully submit that one or the other of two conclusions is inescapable. The fact as to whether an intercorporate relationship within the terms of Section 8a has had any effect upon the supply contract has not been judicially determined. Either appellant is foreclosed from showing the facts by conclusive presumption of the statute, and the statute is therefore fatally arbitrary,—or the facts are still determinative and being determinative, should be developed.

THE ORDER OF THE ILLINOIS COMMERCE COMMISSION, AS APPLIED TO THIS APPELLANT, IS IN CONTRAVENTION OF THE COMMERCE CLAUSE.

The One Organization Cases.

Appellees cite *Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119; *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 398, as authority for their contention that the order of the Commission does not contravene the commerce clause. In each of these cases the supply company and the local utility were wholly owned, directly or indirectly, by the same corporate entity, and the court found in each case as a matter of fact that they were subject to common control; also in each of these cases the order to establish a rate base for the affiliated company was directed to the local utility within the jurisdiction of the Commission and *not to the interstate supply company.*

Appellees apparently attempt to avoid these objections by urging (1) that this case cannot be distinguished from

the one organization cases "on the ground that here the distributing group holds only a twenty-seven per cent stock interest in the pipeline company as compared with the total stock ownership in the" one organization cases, "since, as it has been alleged in the answer, there was a community of interest between the gas producing and distributing groups"; (2) that the Commission has no other means of obtaining the information which it requires.

Neither of these propositions, if true, would make the order of the Commission any less a burden upon interstate commerce. But, neither is true. With respect to the first proposition the fact that the Commission has alleged "community of interest" in its answer does not establish "community of interest" as a fact. Appellees asserted in the court below and the court in effect so found that the factual question of common control is not involved in the case. If, however, the appellees and the court below were in error on this point, appellant should be given an opportunity to show the facts.

With respect to the second proposition we respectfully call the court's attention to its holding in *Heiner* v. *Donnan*, 285 U. S. 312, 318, that one may not be stripped of his constitutional rights in order to serve the convenience of the State. However, it is perfectly apparent that the difficulty suggested by the Commission is entirely imaginary. The local utilities had no difficulty in making the showing required in the one organization cases which have come before this court. Obviously, *if there is common control in fact,* the local utility can always be compelled to produce the information, records and data to which the Commission is entitled, for the local utility and the supply company are, under such circumstances, "in practical effect one organization."

The Illinois Commerce Commission is given broad powers to issue subpoenas and subpoenas duces tecum and to compel the attendance of witnesses and the production of docu-

ments.* The Commission is unwilling to resort to this procedure in the instant case because it is well aware that any testimony or documents which it might require of appellant would be held irrelevant and immaterial to any investigation properly within its jurisdiction.

Other Cases Cited by Appellees.

The cases cited by appellees on pages 58 to 64 of their brief are clearly distinguishable from the case at bar. In each of the cases cited, the burden on interstate commerce was indirect and incidental to the regulation of the *intrastate* business of the person or corporation involved. The regulation of such intrastate business was within the power of the State. This court has held on many occasions that a State is not precluded from any reasonable exercise of its police power merely because interstate commerce may be indirectly and incidentally affected. However, in the instant case the appellant is not engaged in intrastate commerce subject to the jurisdiction of the State and the Commission is not engaged in the exercise of any power vested in the State. The Commission is not attempting to regulate the rates of the Chicago District Pipeline Company, but the rates which appellant may charge for its gas. The Commission is attempting to apply the one organization rule to a situation where, under the decisions of this court, the rule is clearly not applicable. Under such circumstances, any burden on interstate commerce, no matter how slight, is unlawful and will be restrained.

Appellant's Cases.

The Commission has not distinguished the cases relied upon by the appellant. The line of cases headed by *International Text Book Co.* v. *Pigg*, 217 U. S. 91, are indistinguishable from the situation here involved. If the order of the Illinois Commission is not complied with, appellant must

*See Appendix B, Appellant's brief, pages 70 to 74.

withdraw from the State of Illinois or suffer the penalties provided by the Public Utilities Act for non-obedience of the orders of the Illinois Commerce Commission. Likewise, if International Text Book Company had refused to comply with the regulations of the State of Kansas it would have been required to withdraw from the State or suffer the penalties provided for non-compliance.

The order of the Missouri Commission involved in *State, ex rel., Cities Service Gas Company* v. *Public Service Commission*, 337 Mo. 809, 85 S. W. (2) 890, was no more a regulation of or burden upon interstate commerce than the order complained of in this case. The scope and effect of the two orders was the same except that the order of the Illinois Commerce Commission is many times more burdensome.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON AND CHARLES E. BYRNE, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO DISMISS.

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Attorney General of Illinois,
Counsel for Appellees.

MONTGOMERY S. WINNING,
JAMES G. SKINNER,
HARRY R. BOOTH,
W. ROBERT MING, JR.,
Of Counsel.

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Statutes Cited.

An Act of the Illinois Legislature concerning Public Utilities, approved June 29, 1921, and in force July 1, 1921, as amended (Chapter 111a Illinois Revised Statutes 1935, Section 23(1)), subsection f	2
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA, A CORPORATION,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE AND HARRY A. BARR, THE PERSONS CONSTITUTING THE ILLINOIS COMMERCE COMMISSION OF THE STATE OF ILLINOIS, AND OTTO KERNER, ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

This statement is filed on behalf of the appellees herein by the Attorney General of the State of Illinois, attorney for said appellees, pursuant to paragraph 3 of Rule 12 of this Court in answer to the statement filed on behalf of Natural Gas Pipeline Company of America, appellant herein, a copy of which was served on the Attorney General of the State of Illinois on July 14, A. D. 1937.

The statement filed by appellants as required by paragraph 1 of Rule 12 of this Court is incomplete and misleading in that it fails to state that the order of the Illinois Commerce Commission entered March 3, 1937, which appellant seeks to have enjoined in this proceeding, was entered by the said Illinois Commerce Commission in a proceeding now pending before it in which an investigation

is being made as to the reasonableness of the rates of Chicago District Pipeline Company, an Illinois corporation, carrying on the business of selling natural gas to distributing companies as a public utility in the State of Illinois, and subject to the jurisdiction of the Illinois Commerce Commission.

The statement of appellants in quoting from "An Act Concerning Public Utilities," approved June 29, 1921, and in force July 1, 1921, as amended (Chapter 111a Illinois Revised Statutes, 1935, Section 23(1)) as the basis for the Commission's order now complained of, omitted a portion of said statute which is relevant and material to the instant case. That sub-section is as follows:

> "(f) Every corporation which has one or more elective officers, or one or more directors, in common with such public utility;"

We submit that the statement filed by counsel for the appellant did not comply with the provisions of paragraph 1 of Rule 12 of this Court in that it fails to disclose any basis for the conclusion contained in that statement that the District Court abused its discretion in entering the order of July 2nd, A. D. 1937. On the contrary, that court properly exercised its discretion in denying the application of appellant for an interlocutory injunction as is shown by the "Findings of Fact and Conclusions of Law" made by the District Court, since neither the statute nor the order of the Illinois Commerce Commission complained of contravene the provisions of Article I, Section 8, paragraph 3 or the "Due Process" clause of the Constitution of the United States or any provision of the Constitution of the State of Illinois. *Western Distributing Co.* v. *Public Service Commission of Kansas* (1932), 285 U. S. 119, 76 L. Ed. 655; *Smith* v. *Illinois Bell Telephone Company* (1930), 282 U. S. 133, 75 L. Ed. 255; *Geddes et al.* v. *Ana-*

conda Copper Mining Company (1921), 254 U. S. 590; *Interstate Commerce Commission* v. *Goodrich Transit Company* (1912), 224 U. S. 194, 211, 216; *People ex rel. Stead* v. *Chicago, I. & L. Ry. Co.* (1906), 223 Ill. 581, 591-4; *State of Kansas ex rel. Public Utilities Comm.* v. *A. T. & S. F. Ry. Co.* (1924), 116 Kan. 151, 225 Pac. 1026; *State of Kansas ex rel. Public Utilities Comm.* v. *A. T. & S. F. Ry. Co.* (1924), 115 Kan. 3; *Texas & P. Ry.* v. *Railroad Comm. of Texas* (1912), 105 Tex. 386, 150 S. W. 878.

We submit further that the District Court did not abuse its discretion in entering the order of July 2nd, A. D. 1937, without first holding a hearing on the merits since the Court granted the fullest possible opportunity to the parties to this cause to argue the question as to whether an interlocutory injunction should be granted and permitted the parties to file memoranda in support of their respective positions. Moreover, a hearing on the merits is, we submit, entirely unnecessary since only questions of law are involved in this case, and they may be fully passed on and determined on the application for an interlocutory injunction.

Wherefore the appellees pray that the appeal be dismissed with costs to appellees.

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Attorney for Appellees.

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